THE GREY AREA

Concordia UNIVERSITY

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**Editor's Note**

This issue of *The Grey Area* deals with contracts. Most of the University's activities and operations involve contracts. For example, Purchasing Services' goods and services contracts are worth an estimated annual value of between $20 million and $30 million.

A contract may be defined as a verbal or written agreement, between two or more persons, which gives rise to certain rights and obligations. The *Civil Code of Québec* is its primary regulating instrument. This Code was the subject of a major reform, and a new Code, adopted by the National Assembly on December 18th, 1991, will be in force on January 1st, 1994.

We will attempt to explain the principal legal rules regarding contracts set out in the Code, particularly through questions and answers. We will also discuss the contents of contracts concluded by the University as an educational institution and as an employer.

Finally, we will cover the most significant features of the new *Civil Code of Québec* pertaining to contracts.

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*Contracts are matters governed by private law, which regulates private relationships. However, some aspects of contracts concluded between an individual or a body and the government are regulated by administrative law.*

*The contracts signed by the University are mostly private contracts governed by civil law. The following is a brief analysis of the legal framework of these contracts.*

### Civil Code of Québec

Adopted in 1867, this Code deals notably with the conditions of a contract, the various obligations it may set out, its interpretation, execution and enforcement. The Code regulates all contracts but deals in greater detail with a certain type known as nominate contracts. These contracts are the contract of sale; the contract of gift; the contract of leasing; the contract of affreightment; the contract of transport; the contract of employment; the contract of enterprise or for services; the mandate; the partnership; the contract of deposit; the contract of loan; the contract of suretyship; the contract of annuity; and the contract of insurance.

### Québec Charter of Rights and Freedoms

The Québec Charter applies to all activities, public or private. Thus it prohibits discriminatory provisions in contracts on the grounds enumerated in the Charter.

### Labour Standards Act

This Act sets out minimum employment standards with respect to obligations in the employment relationship. Neither a collective agreement nor an individual employment contract may contain provisions which contravene the minimum standards set out in the Act.

### Labour Code

This Act regulates the employment relationship existing between a union and an employer. It regulates the negotiation of a collective agreement and establishes the grievance process to which a party may address itself for the interpretation and application of a collective agreement.

### Occupational Health and Safety Act

This Act sets out employer-employee rights and obligations. These rights are implicitly understood to form part of every employment, enterprise or services contract. This Act also deals with all aspects of workers' compensation.

## QUESTIONS & ANSWERS

**Q: What are the essential elements of a contract?**

A: Parties legally capable of contracting; their consent legally given; an object; and a lawful cause or consideration.

**Q: Are there any persons who are incapable of contracting?**

A: Yes: minors; persons of full age under tutorship or curatorship; insane persons; and persons suffering from a temporary physical or mental disability.

**Q: What may vitiate or invalidate consent?**

A: An error in the nature of the contract itself, in the substance of its object or in its consideration; fraud; violence or fear.

**Q: What is an unlawful consideration?**

A: A consideration prohibited by law or contrary to good morals or public order.

**Q: May a contract be verbal?**

A: Yes. However, if its value exceeds $1,000, its proof cannot be made by way of testimony.

**Q: Will the courts accept testimony as a valid way to challenge the terms of a contract?**

A: No. Testimony cannot be used to contradict the terms of a contract but it may be received to prove that consent was given by error, fraud, violence or fear.

**Q: Who may validly bind the University?**

A: If a third party, in good faith, has reasonable grounds to believe that an employee has the power to contract on behalf of the University, such person may bind the University. According to the "indoor management rule" developed by the courts, a third party, acting in good faith, is entitled to assume that the internal regulations or policies of a corporation have been followed. Consequently, it is important for an

employee to abide by the University Purchasing Policy and Procedures.

**Q: What are the principal rules of interpretation of a contract?**

A:
- When the meaning of a contract is doubtful, it shall be determined by interpretation rather than by the literal meaning of the words used.
- All its provisions shall be interpreted in relation to one another.
- In case of doubt, it shall be interpreted in favour of the person who has contracted the obligation and against the person who stipulates it (ex: in favour of the buyer, the borrower, the lessee, the student, the employee).

**Q: Can someone oppose to a third party a contract that he or she has signed?**

A: Contracts are binding only between the contracting parties. A person can only bind himself or herself or his or her heirs. However, a person can make a stipulation in a contract for the benefit of a third person in his or her own name (by way of gift, by will). Furthermore, a person may promise that a third person will undertake to perform an obligation, but he or she will be personally liable if this obligation is not fulfilled by the third person.

**Q: Are the obligations of a contract limited to what is expressed in it?**

A: No. These obligations also extend to those which flow from equity, usage or law. Thus, the Supreme Court of Canada has ruled that equity implies a duty of good faith in the performance of contractual obligations.

**Q: Does the Québec *Consumer Protection Act* apply to goods or services contracts concluded by the University?**

A: Not being a physical person, the University is not considered a consumer according to this Act.

**Q: Does this Act apply to the contract between a student and the University?**

A: No. This contract has been expressly excluded from the application of the *Consumer Protection Act*.

**Q: What is an authentic writing?**

A: An authentic writing makes complete proof of its contents and, as opposed to a private writing, its signature is not required to be proven. For example, a notarial deed is an authentic writing.

**Q: Are there contracts which must be registered at a registry office?**

A: Yes, like all deeds conveying the ownership of immoveable property. Failing such registration, the title of conveyance of a property cannot be invoked against a third party who has purchased the same and whose title is registered.

**Q: What is the nature of the liability pertaining to the performance of a contract?**

A: This liability is contractual. However, unreasonable actions regarding the exercise of contractual rights may be considered as a fault, give rise to civil liability and result in damages. Two years ago, the Supreme Court of Canada unequivocally reaffirmed the doctrine of abuse of rights in contractual matters. This doctrine encompasses not only malicious and intentionally harmful exercises of contractual rights, but unreasonable exercise of such rights as well.

**Q: Can a contract be rescinded?**

A: Yes, by judgement of a court on grounds recognized by law, or by agreement of the parties. In some contracts, a resolutive clause is recommended. A typical resolutive clause allows a party the right to terminate the agreement if the other party breaches one of its terms and conditions.

**Q: Does a commercial lease agreement require registration?**

A: No. However, a lease registered with a fixed term cannot be rescinded if more than twelve months of its term remain from the date of alienation of the property where the rented premises are located. Otherwise, it could be rescinded upon expiry of the twelve months, by giving the lessee a written six months notice.

**Q: What is a mandate?**

A: A mandate is a contract by which a person (the mandator) empowers another person (the mandatary) to represent him or her in the performance of a judicial act. The mandatary acting in the name of the mandator and within the scope of his or her mandate is not personally liable to the third person with whom he or she contracts.

**Q: What is a performance bond?**

A: A performance bond is a document whereby an insurance company undertakes to pay a sum of money to a party in the event that the other party to the contract fails to execute the obligations.

**Q: What is a bid bond?**

A: A bid bond is a document whereby an insurance company guarantees that a tenderer will undertake the obligations contained in his or her submitted proposal. If for some reason the tenderer cannot respect his or her proposal, the other party is entitled to secure the bond.

## CASE-LAW

**The doctrine of abuse of rights.**

In 1981, in the decision of *Banque Canadienne Nationale v. Soucisse*, the Supreme Court of Canada ruled that the notion of equity implied a duty of good faith in the performance of a contract. Although there is no explicit duty of good faith in the *Civil Code of Québec*, the Supreme Court relied on its Article 1024, which states that the obligations of a contract also extend to all the consequences which by equity, usage or law are incidental to a contract, depending on its nature.

In 1990, the Supreme Court reaffirmed the existence of this duty by enunciating clearly the juridical basis of the doctrine of abuse of rights. In the opinion of the Court, there is a standard of behaviour required of contracting parties in the exercise of their contractual rights. This standard is one of reasonableness. Malice or absence of good faith are not the exclusive criteria to assess whether a contractual right has been abused. The ambit of abuse of rights encompasses unreasonableness as well.

Thus, in *Banque Canadienne Nationale v. Houle*, the Supreme Court held that this bank had abused its rights contained in the loan contracts of a company. All these loans were demand loans which, by the terms of their contract, contained no specific requirement of notice before they could be called. During the negotiations of the sale of shares of the Houle brothers' company, the Bank decided to recall the loans. This action impaired significantly the bargaining power of the shareholders. According to the Court, the Bank had abused its rights. The Bank was ordered to pay to the shareholders $250,000 in damages, representing the difference of the purchase price received ($300,000) and the evaluated worth of the company's shares at the date of sale ($500,000).

(Cases discussed: *Banque Canadienne Nationale v. Soucisse*, [1981] 2 S.C.R. 339; *Banque Canadienne Nationale v. Houle*, [1990] 2 S.C.R. 122.)

### Research contract or grant?

A grant is financial assistance given to a researcher conducting research on a subject of his or her choice without any formal stipulations with respect to its direction. The following characteristics are normally those of a grant:

- No direct or indirect reimbursement to the principal researcher
- No limitations on publications
- No specific transfer of results to the granting agency
- Payment is made to the University in advance of expenditures.

A research contract is an agreement between the University and an individual or body in order to provide financial assistance to conduct research under specific stipulations and conditions. These conditions may include:

- A specific outline of work
- A set time schedule
- A deliverance of products
- An agreement with respect to ownership, patent rights and licensing
- Budget approvals and payment schedules
- Considerations for acceptance and/or termination of agreement
- Overhead costs are paid by the contractor.

The Office of Research Services and its Industrial Liaison Office are responsible for all grants and research contracts. In all related matters they should be contacted.

# PRINCIPAL UNIVERSITY CONTRACTS 5

The most important contracts concluded by the University are those between this institution, its students, its faculty members and its employees. These contracts set out rights and obligations as well. The following are summaries of these rights and obligations:

## STUDENT CONTRACT

**Sources:**

1) Academic regulations
2) University policies
3) *Civil Code of Québec*
4) Québec *Charter of Rights and Freedoms*
5) *Accreditation and Financing of Student Organizations Act*
6) *Students Loans and Bursaries Act*
7) Operating grant conditions (re: academic fees)

***Academic Rights***

- The right to register in the programme in which the student has been admitted
- Subject to academic, disciplinary and financial conditions, the right to follow the programme until its completion
- Legitimate expectations of receiving a quality education
- The right to the recognition of his or her credits
- The conditional right to receive a diploma on the basis of a fair evaluation
- Intellectual property rights to his or her work

***Political Rights***

- The right of association
- The right to participate in some University decision-making bodies (Senate, Board of Governors)

***Economic Rights***

- The assessment of academic fees by the Government
- The financing of student associations

***Procedural Rights***

- The right to re-evaluation of his or her exams or works
- In disciplinary matters, the right to the rules of natural justice (duty to act fairly)

***Other Rights***

- The right to a safe and healthy environment
- Various other rights which flow from University policies

***Academic Obligations***

- Registration
- Respect of academic and disciplinary regulations

***Economic Obligations***

- Payment of academic fees
- Payment of association fees

***Other Obligations***

- Obligations flowing from University policies

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## TEACHING CONTRACT

**Sources:**

1) Québec *Labour Code*
2) Collective agreements
3) *Civil Code of Québec*
4) Québec *Charter of Rights and Freedoms*
5) *Occupational Health and Safety Act*
6) Some University Policies

***Academic Rights***

- Academic freedom
- Subject to academic regulations, autonomy in determination and execution of academic and research duties and responsibilities
- Conditional rights related to university ranks and career (reappointment; promotion)
- Conditional intellectual property rights (i.e. subject to the Collective Agreement)

*Political Rights*

- Right of association
- Right to participate in some University decision-making bodies (Senate, Board of Governors; Faculty Councils)
- Right to strike

*Economic Rights*

- Salaries and benefits
- Holidays
- Conditional sabbatical leaves
- Employment equity

*Procedural Rights*

- The right to appeal decisions on renewal and promotion
- In disciplinary matters, the right to the rules of natural justice (duty to act fairly)
- Arbitration

*Other Rights*

- Right to a safe and healthy working environment
- Other rights flowing from University policies

*Academic Obligations*

- Teaching
- Research and scholarship
- Service to the University and the community
- Qualitative standards in the performance of duties and responsibilities (competence, diligence, standards of behaviour)
- Quantitative standards in the performance of duties and responsibilities

*Other Obligations*

- If applicable, obligations flowing from University policies

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## ADMINISTRATIVE & SUPPORT STAFF MEMBERS' EMPLOYMENT CONTRACT

**Sources:**

1) University policies
2) *Civil Code of Québec*
3) *Labour Standards Act* (except for senior administrators and directors)
4) If applicable, *Québec Labour Code* and collective agreements
5) Québec *Charter of Rights and Freedoms*
6) *Occupational Health and Safety Act*

*Political Rights*

- Right of association
- Right to participate in some University decision-making bodies
- The right to strike

*Economic Rights*

- Salaries and benefits
- Employment security for full-time staff members
- Holidays
- Employment equity

*Procedural Rights*

- In disciplinary matters, the right to the rules of natural justice (duty to act fairly)
- If applicable, the same right flowing from collective agreements and arbitration

*Other Rights*

- Right to a safe and healthy working environment
- Other rights flowing from University policies

*Work related Obligations*

- Qualitative standards in the performance of duties and responsibilities (competence, diligence, standards of good behaviour)
- Quantitative standards in the performance of duties and responsibilities

*Other Obligations*

- Obligations flowing from University policies

## Did you know that under the new Civil Code...

**Minors and persons under protective supervision are not the sole persons who have the right to request the annulment of a contract which they have signed.**

Courts are entitled to annul a contract when the obligation it sets out is considered excessive in view of the patrimonial situation of a person, the advantages he or she gains from the contract and the general circumstances related to its conclusion. However, the courts may maintain the contract if the defendant offers a reduction of his or her claim.

**An abusive clause in a consumer contract or contract of adhesion is null and the obligation arising from it may be reduced.**

A contract of adhesion is a contract in which the essential provisions are imposed or drawn up by one of the parties and are not negotiable. A consumer contract is a contract concluded between a consumer and a merchant or manufacturer. An abusive clause is considered to be a clause which is excessively and unreasonably detrimental to the consumer or the adhering party and therefore not in good faith.

**Parties to a contract shall conduct themselves in good faith.**

This duty exists both at the time the contract is created and at the time it is performed or terminated. This duty flows from the incorporation of the doctrine of abuse of rights in Québec civil law.

**A person may no longer exclude or limit his or her liability for physical or moral damages caused to another person.**

The Code allows a person to exclude or limit his or her liability for material damages caused to another person, except through an intentional or gross fault. However, a person cannot by way of contract or notice, exclude his or her liability for physical or moral damages caused to another person.

**The Code expressly acknowledges the duty for a person to honour his or her contractual undertakings.**

If this person fails in this duty, he or she is not only liable for any physical, moral or material damages caused to the other contracting party, but is liable for repairing the injury as well.

This bulletin has been prepared for purposes of general information only. It must in no case be considered as a comprehensive study of the law nor an expression of opinion upon the matters reviewed in it. It would be advisable to consult with the Office of the Legal Counsel with respect to any question(s) concerning individual circumstances.

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